



UNIVERSITY OF
TORONTO
FACULTY OF LAW



CASEBOOK:

From Blueprints to Buildings: Legal Issues in the Construction Industry

(Volume 2 of 2)

Harvey J. Kirsh
Adjunct Professor
Osler, Hoskin & Harcourt LLP
September, 2007

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From Blueprints To Buildings: Legal Issues In The Construction Industry

CASEBOOK INDEX

Faculty of Law, University of Toronto
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Harvey J. Kirsh
Adjunct Professor
Osler, Hoskin & Harcourt LLP

VOLUME I

I. INTRODUCTION

September 6, 2007

Readings

Construction pyramid.....	1
Project Manual/Specifications, Four Seasons Center for the Performing Arts (prepared by Diamond Schmitt Architects) [on reserve]	

II. CONSTRUCTION CONTRACTS

September 20, 2007

Readings

Harvey J. Kirsh and Lori Roth, <i>Kirsh and Roth: The Annotated Construction Contract</i> (CCDC 2-1994) [on reserve]	
Lloyd D. Cadsby, "The Construction Contract", 17 C.L.R. 37.....	2
Stipulated Price Contract -- CCDC 2 – 1994.....	17
Stipulated Price Subcontract -- CCA 1-2001.....	54
Construction Management Contract -- CCA 5-1998.....	81
Contract for Architectural Services – Document 6-2002	105
Agreement Between Client and Engineer.....	150

<i>Timbro Developments Ltd. v. Grimsby Diesel Motors Inc. et al.</i> (Ont. C.A.) 32 C.L.R. 32.....	166
Lori Roth, “Legal Corner” article on “pay-when-paid” clauses	168

III. CONSTRUCTION TENDERS / BIDS / PROCUREMENT

September 27, 2007

Readings

Paul Sandori and William M. Pigott, <i>Bidding and Tendering: What is the Law?</i> [on reserve]	
Bid Bond – CCDC 220-2002	172
A Guide to Calling Bids and Awarding Construction Contracts – CCDC 23-2005	173
Harold A. Emsig, “How a Bid Depository Works”, 8 C.L.R. 249.....	219
<i>The Queen v. Ron Engineering & Construction (Eastern) Ltd.</i> [1981] 1 S.C.R. 111	222
<i>M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.</i> [1999] 1 S.C.R. 619	240
<i>Chinook Aggregates Ltd. v. Municipal District of Abbotsford et al.</i> , 28 C.L.R. 290 (County Court); 35 C.L.R. 241 (B.C.C.A.).....	262
Donald W. Goodfellow, Q.C., “The Law of Tendering – The Canadian Advantage”, (chapter in 2007 Journal of the Canadian College of Construction Lawyers).....	281

IV. CONSTRUCTION PROJECT DELIVERY SYSTEMS

October 11, 2007

Readings

Harvey J. Kirsh, “Design-Build”, “Construction & the Law” (Fall 1998 issue) at p.1.	335
“Some Terms Defined”, Society of The American Institute of Architects (Minnesota).....	340
D. Robert Beaumont and Andrew Wong, “Effectively Documenting Project Delivery Structures”, in <i>10th Annual Construction Superconference</i> (Canadian Institute, Toronto, 2001).....	341
Joseph L. Hardesty, “Selecting the Right Construction Project Delivery System” (Lorman Education Services Construction Update Newsletter – March 2005).....	405
“Project Delivery Systems” (unpublished).....	407

V. CONSTRUCTION BONDS

October 18, 2007

Readings

Kenneth W. Scott and R. Bruce Reynolds, *Scott and Reynolds on Surety Bonds* [on reserve]

Performance Bond -- CCDC 221-2002.....	416
Labour and Material Payment Bond -- CCDC 222-2002	417
"A Guide to Construction Surety Bonds" (CCDC 22 -- 2002)	419
Kenneth W. Scott, Q.C., "Bonding and Insurance", 19 C.L.R. 207.....	440
R. Bruce Reynolds, "Whitby Landmark: Much Ado About Nothing?" (2002), 12 C.L.R. (3d) 23.....	462
Lori Roth, "Failure to Comply with Notice Provisions of Labour and Materials Bonds", Construction Law Letter, Vol. 5, No. 3	474

VOLUME II

VI. CONSTRUCTION DISPUTES / CLAIMS

October 25, 2007

Readings

Anna Esposito and Maria Tassou, "Overview of Construction Delay Claims and Delay Damages" (Ontario Bar Association program on "Construction Delay Claims: Following the Critical Path" [March 2, 2006])	477
Paul A. Ivanoff and Natasha Hutchinson, "Loss of Productivity Claims", (Ontario Bar Association program on "Construction Delay Claims: Following the Critical Path" [March 2, 2006]).....	496
Stephen G. Revay, "Selected Damage Issues in Construction Litigation", 16 C.L.R. 217	520
Stephen G. Revay, "Calculating Impact Costs", 27 C.L.R. 239	557
Lawlor Rochester, "Non-Pecuniary Damages for Breach of a Construction Contract", 13 C.L.R. 63	589

William G. J. Swybrous, Q.C., “ <i>Extras and Change Orders</i> ”, 15 C.L.R. 221	594
-------------------------------------------------------------------------------------------	-----

VII. +

VIII. CONSTRUCTION LIENS

November 1 and 15, 2007

Readings

<i>Construction Lien Act</i> , R.S.O. 1990, chap. C.30, as am.	636
Harvey J. Kirsh, <i>Kirsh’s Guide to Construction Liens in Ontario</i> [on reserve]	
David Bristow et al, <i>Construction, Builders’ and Mechanics’ Liens</i> <i>in Canada</i> [on reserve]	
Duncan W. Glaholt, <i>Conduct of a Lien Action</i> [on reserve]	
Toronto Construction Association, “ <i>A Layman’s Guide to</i> <i>Construction Liens in Ontario</i> ”	680
Sample claim for lien	761
Sample statement of claim	765
Sample certificate of action	783
Roger J. Gillott, “ <i>Teranet, the Internet, and Liens: Electronic</i> <i>Registration Meets Construction Law</i> ”, in <i>The Essential</i> <i>Curriculum in Construction Law: Three Key Courses</i> (Osgoode Hall Law School, Toronto, 2001)	786
Harvey J. Kirsh, “ <i>The Impact of the Construction Lien Act Upon</i> <i>Mortgage Lenders</i> ”, (1983), 4 Adv. Q. 211	800
M. Janine Kovach, “ <i>Personal Liability for Breach of Trust Under</i> <i>the Construction Lien Act</i> ”, <i>Construction Law Letter</i> , Vol. 3, No. 6	808

IX. A DAY IN COURT

November 19, 2007

[no readings]

The class will have the opportunity to attend the opening of a construction lien trial before Master Carol Albert of the Ontario Superior Court of Justice. Should the litigation settle, Master Albert has agreed to convene a “Roundtable Discussion” in her court chambers to discuss issues relating to construction lien claims and trials.

X. CONSTRUCTION LITIGATION AND A.D.R.

November 22, 2007

Readings

Harvey J. Kirsh, " <i>The Paper Trail</i> "	810
Timothy Pinos, " <i>Major Issues Concerning Pre-Trial Settlement in the Process of Litigation</i> ", Construction Law Letter, Vol. 6, No. 6	814
Mr. Justice Alvin B. Rosenberg, " <i>Construction Litigation</i> ", 10 C.L.R. 221	817
Law Society of Upper Canada, " <i>Short Glossary of Dispute Resolution Terms</i> " (July 1992)	833
Rules for Mediation and Arbitration of Construction Disputes – CCDC 40-2005	843
Harvey J. Kirsh, " <i>Arbitrating Construction Disputes</i> " (chapter in Emond, <u>Commercial Dispute Resolution</u>)	857
John C. Carson, " <i>Dispute Resolution – Negotiation, Mediation and Arbitration in Ontario</i> ", unpublished paper.....	885
D. Robert Beaumont, " <i>Dispute Review Boards Prove Valuable in Reducing Construction Litigation</i> ", Osler Construction Briefing, Fall 2001	937
" <i>What is Partnering?</i> " (excerpt from publication of American General Contractors Association)	939
Duncan W. Glaholt, " <i>The Adjudication Option: The Case for Uniform Payment & Performance Legislation in Canada</i> " (excerpt)	949

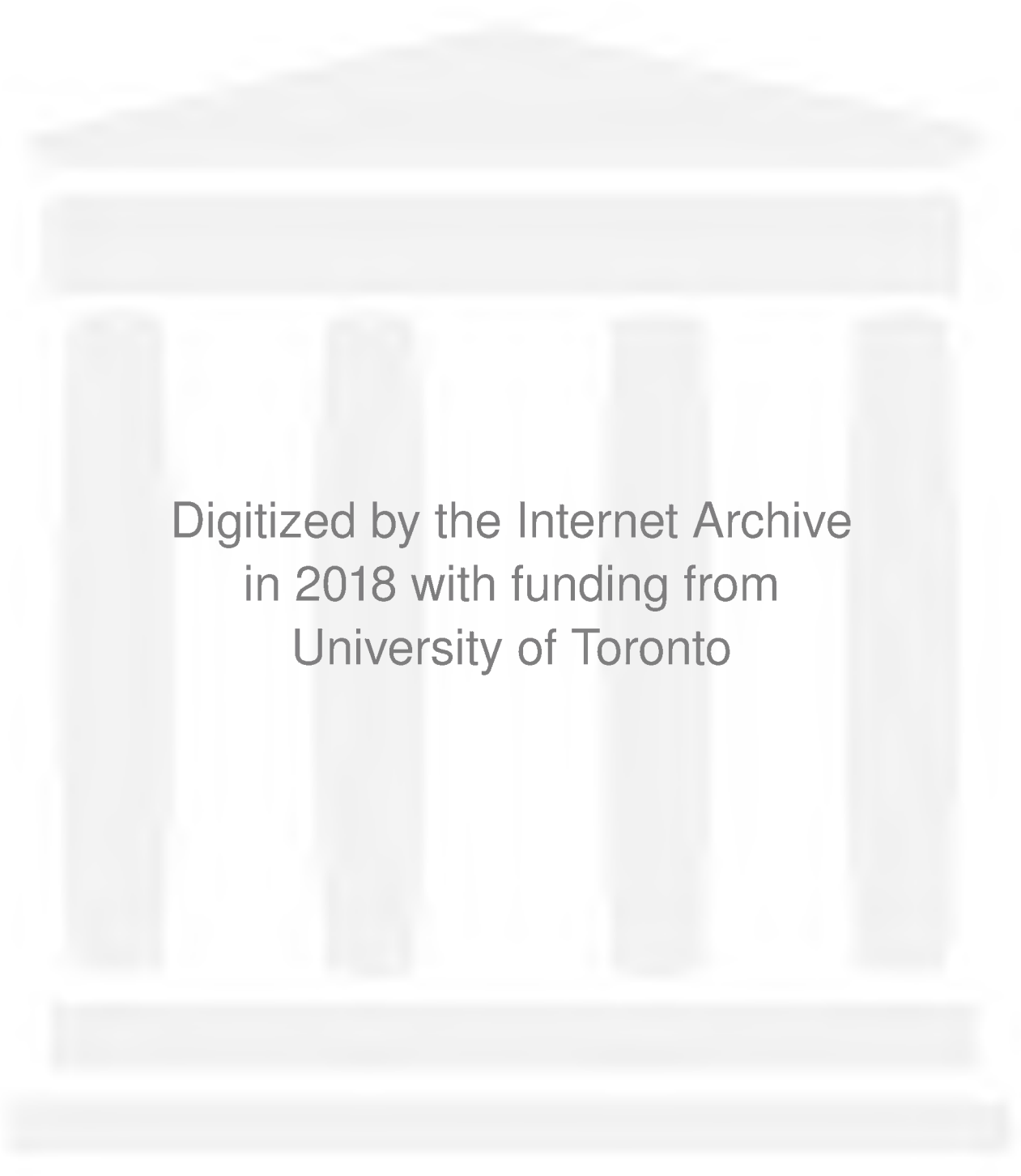
XI. EFFECT OF BANKRUPTCY/INSOLVENCY: WHAT HAPPENS WHEN THE PROJECT GOES SOUR?

November 29, 2007

Readings

Max Shafir and Sandra Astolfo, " <i>A Brief on Bankruptcies and Insolvencies and Their Effects on the Construction Project</i> " [without attachments], in <i>The Essential Curriculum in Construction Law: Three Key Courses</i> (Osgoode Hall Law School, Toronto, 2001)	970
<i>Toro Aluminum v. Revah</i> (2000) 3 C.L.R. (3d) 1	980

Matthew R. Alter and Cullen F. Price, “ <i>Construction Liens and The Companies' Creditors Arrangement Act</i> ” (2005), 41 C.L.R. (3d) 9.....	995
Frank Bennett, “ <i>Anticipating What Happens When the Project Turns Sour: Bankruptcy and/or Receivership</i> ” (1988), 26 C.L.R. 14.....	1007



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THE PAPER TRAIL

By Harvey J. Kirsh
Construction and Infrastructure Group
Osler, Hoskin and Harcourt LLP

Large construction projects generate thousands of pages of documents. Some of those documents create the legal relationships between the parties who were actively involved in the construction process. Others of those documents vividly demonstrate how the parties dealt with issues as they came up during the course of construction. Just think of it:

- Contract documents (including General Conditions, Supplementary General Conditions, specifications, drawings, soils reports, bonds, etc.)
- Drawings (including tender set, issued-for-construction set, as-built set, shop drawings, erection drawings, etc.)
- Schedules (including original construction schedule and all subsequent generations showing changes / revisions)
- CCN's, price quotations, and Change Orders
- Applications for payment, and Payment Certificates
- Inspection Reports, Testing Reports
- Minutes of Site Meetings, and the handwritten notes of those present
- Deficiency Lists
- Correspondence, inter-office memos, and e-mails
- Handwritten notes of telephone conversations
- Site Superintendent reports (e.g., Daily Reports, Diaries, Logs)

For a lawyer, this is a treasure trove of evidence that will assist in the prosecution or defence of a construction claim.

These documents, for better or worse, complete or deficient, accurate or self-serving, comprise the complete written history of the project. They tell us who did what on the

project; they tell us about design issues and how they were handled; they tell us about construction problems, and how they were addressed (or not addressed); they tell us about delays, and often state outright, or hint or allege, who was responsible; they tell us about disputes, and how they were resolved (or not resolved); they tell us about delivery problems, labour problems, the number of men on the site every day, whether it was sunny on a particular day, and whether propane heaters were used to heat the site during winter work. But one thing is very clear – the importance of these documents should never be underrated.

When a construction claim is being litigated, these types of documents are usually provided to me in a large number of archive boxes, and are not always organized. But if you were to arrange them in chronological order, they would tell a story in a comprehensible and revealing manner. That story, which tends to unfold during and after construction, often traces the history of construction problems which may ultimately mature into one or more construction claims. The way that story is told may very well determine whether or not the construction claim will be defeated or allowed.

The case of the leaking office building is a good example. During construction, it was not apparent that there was a problem. It was not until after the building became occupied that one of the tenants noted a number of puddles on the floor of his office after a heavy rainfall. More tenants in other offices had the same experience, and the problem became widespread and serious. The point of entry of the water could not be discerned. It was not clear whether the water was penetrating the masonry, or coming through the window gaskets, or from the roof, or from some other point of entry; and it was not clear whether it was design or a construction or a materials problem.

So the owner sued everyone in sight, and hoped that the litigation would sort things out. Named as defendants in the law suit were the general contractor, the masonry subcontractor, the window supplier, the roofing subcontractor, the structural steel subcontractor, the architect, the structural engineer, and others. The owner also sued the general contractor's bonding company, under the Performance Bond. As you would expect, each of these parties said they did nothing wrong and blamed others.

Accordingly, they crossclaimed against each other in the litigation, and took third party proceedings and fourth party proceedings. All parties hired lawyers; some were represented by their insurers; some had retained expert witnesses (with varying degrees of expertise); and the show got underway.

Each of these many parties to the litigation had an obligation to produce all documents in their possession which were relevant to the issues in dispute. In turn, each party had the right to review the documents produced by the opposing parties. In doing so, each party was looking for a “smoking gun” in the opposing parties’ documents. A “smoking gun” consists of one or more documents which may serve to implicate another party, or to shift the blame or focus away from themselves.

In the case of the leaky building, the owner’s lawyer, during the process of documentary discovery, was able to uncover numerous letters which had never been seen before, between the contractor and the masonry subcontractor, in which the contractor had warned about the masonry work. In particular, there were allegations of pour grouting, which might have allowed water penetration through the building envelope. The comprehensive Daily Site Reports also indicated that the masonry subcontractor employed crews of mostly apprentice masons. Furthermore, there were letters, notes and other documents which indicated that there were disputes between the architect and the structural engineer, in which the architect warned that certain alleged design deficiencies could lead to a “twisting” of the structure, a separation of the masonry, and the consequent water penetration. The detailed Minutes of Site Meetings also made reference to problems with the steel erection which, in retrospect, were seen to have been caused by a deficiency in the structural design.

Uncovering these documents helped the parties to identify the causes of the leakage problem, and suggested certain remedial strategies. The documents also helped to establish which parties were responsible for, or may have contributed to, the problem.

The law suit was resolved shortly thereafter. But for the detailed and thorough paper trail leading to the masonry sub and the structural engineer, and leading away from the

roofing subcontractor and the steel supplier, the litigation may have continued through an extensive and expensive discovery process, and on to trial.

In baseball, the rule is that a tie goes to the runner. In a construction claim scenario, a tie goes to the person with the best paper trail.